STATE OF SOUTH CAROLINA)
)
(Caption of Case))

IN THE MATTER OF PETITION OF SPRINT COMMUNICATIONS COMPANY L.P. AND SPRINT SPECTRUM L. P. D/B/A SPRINT PCS FOR ARBITRATION OF RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST

BEFORE THE
PUBLIC SERVICE COMMISSION

COVER SHEET

DOCKET NUMBER: 2007 - 215 - C

(Please type or print)

Submitted by: J. Jeffrey Pascoe
SC Bar Number: 71104
Address: 550 So. Main Street, Suite 400
Greenville, SC 29601
Telephone: 864.255.5422
Fax: 864.255.5855
Other:
Email: jpascoe@wcsr.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ **Emergency Relief demanded in petition** ☐ **Request for item to be placed on Commission's Agenda expeditiously**

☒ **Other: Post-Hearing Brief**

INDUSTRY (Check one)

- ☐ Electric
- ☐ Electric/Gas
- ☐ Electric/Telecommunications
- ☐ Electric/Water
- ☐ Electric/Water/Telecom.
- ☐ Electric/Water/Sewer
- ☐ Gas
- ☐ Railroad
- ☐ Sewer
- ☒ Telecommunications
- ☐ Transportation
- ☐ Water
- ☐ Water/Sewer
- ☐ Administrative Matter
- ☐ Other:

NATURE OF ACTION (Check all that apply)

- ☐ Affidavit
- ☐ Agreement
- ☐ Answer
- ☐ Appellate Review
- ☐ Application
- ☒ Brief
- ☐ Certificate
- ☐ Comments
- ☐ Complaint
- ☐ Consent Order
- ☐ Discovery
- ☐ Exhibit
- ☐ Expedited Consideration
- ☐ Interconnection Agreement
- ☐ Interconnection Amendment
- ☐ Late-Filed Exhibit
- ☐ Letter
- ☐ Memorandum
- ☐ Motion
- ☐ Objection
- ☐ Petition
- ☐ Petition for Reconsideration
- ☐ Petition for Rulemaking
- ☐ Petition for Rule to Show Cause
- ☐ Petition to Intervene
- ☐ Petition to Intervene Out of Time
- ☐ Prefiled Testimony
- ☐ Promotion
- ☐ Proposed Order
- ☐ Protest
- ☐ Publisher's Affidavit
- ☐ Report
- ☐ Request
- ☐ Request for Certificatio
- ☐ Request for Investigatior
- ☐ Resale Agreement
- ☐ Resale Amendment
- ☐ Reservation Letter
- ☐ Response
- ☐ Response to Discovery
- ☐ Return to Petition
- ☐ Stipulation
- ☐ Subpoena
- ☐ Tariff
- ☐ Other:

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN THE MATTER OF PETITION OF SPRINT COMMUNICATIONS COMPANY L.P. AND SPRINT SPECTRUM L. P. D/B/A SPRINT PCS FOR ARBITRATION OF RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST		Docket No. 2007-215-C

SPRINT'S
POST-HEARING BRIEF

J. Jeffrey Pascoe
Womble Carlyle Sandridge & Rice
550 South Main Street, Suite 400
Greenville, SC 29601
(864) 255-5400 (Telephone)

William R. Atkinson
Sprint Nextel
233 Peachtree Street NE, Suite 2200
Atlanta, GA 30339-3166
(404) 649-0003 (Telephone)

Joseph M. Chiarelli
6450 Sprint Parkway
Mailstop: KSOPHN0214-2A671
Overland Park, KS 66251
(913) 315-9223 (Telephone)

ATTORNEYS FOR SPRINT
COMMUNICATIONS COMPANY L.P.
AND SPRINT SPECTRUM L.P. D/B/A
SPRINT PCS

I. INTRODUCTION

Sprint Communications Company L.P. and Sprint Spectrum L.P. ("Sprint") seeks to implement an amendment to convert and extend its current, effective month-to-month Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast ("AT&T")[1] to a fixed three-year term with a commencement date of March 20, 2007. March 20, 2007 is the date that Sprint requested such extension within the Parties' ongoing Section 251-252 interconnection negotiations under the Telecommunications Act of 1996 (the "Act"). Sprint's right to a three-year extension emanates from the Merger Commitment interconnection-offer No. 4 that AT&T was required to make to Sprint as a result of the FCC[2] approving the AT&T, Inc. / BellSouth Corp. merger on December 29, 2006. The Merger Commitment interconnection-offer No. 4, which was in fact made to Sprint in the course of the Parties' ongoing Section 251-252 interconnection negotiations, required AT&T to permit to Sprint to:

> "extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law" and that "[d]uring this period, the interconnection agreement may be terminated only via [Sprint's] request unless terminated pursuant to the agreement's 'default' provisions."[3]

AT&T does *not* dispute that Sprint is entitled to the requested three-year extension of the Parties' existing Interconnection Agreement. What *is* disputed in this case cannot be stated any

---

[1] Sprint and AT&T may be referred to herein as a "Party," or collectively, as the "Parties."

[2] Federal Communications Communication is referred to as "FCC."

[3] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, APPENDIX F, ¶4 at page 150 ("Merger Commitment No. 4"), WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("AT&T/BellSouth" or "FCC Order").

clearer than the following allegations in Sprint's Petition, which AT&T *admitted without qualification*:

> Soon after the FCC-approved Merger Commitments were publicly announced on December 29, 2006, the Parties considered the impact of the Merger Commitments upon their pending Interconnection Agreement negotiations. *AT&T acknowledged that, pursuant to Interconnection Merger Commitment No. 4, Sprint can extend its current Interconnection Agreement for three years. The Parties disagree, however, regarding the commencement date for such three-year extension.*[4]

The operative facts[5] and clear case law[6] clearly support a finding by the Public Service Commission of South Carolina ("Commission") that Sprint is entitled to prevail on its one issue presented for arbitration in this matter, i.e., that Sprint is entitled to a three-year extension of its current month-to-month Interconnection Agreement from a commencement date of March 20, 2007. First, having been timely raised and discussed within the Parties' Section 251-252 interconnection negotiations, the commencement date of a three-year extension to their existing Interconnection Agreement is an essential interconnection term and condition that AT&T was obligated to address in such negotiations pursuant to 47 U.S.C. § 251(c)(2)(D). Absent the Parties' reaching a negotiated three-year amendment commencement date within such interconnection negotiations, AT&T was obligated to arbitrate that very issue pursuant to not

---

[4] *In the Matter of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast,* Docket No. 2007-215-C, "Petition for Arbitration of Sprint Communications Company L.P. and Sprint Spectrum L.P." at ¶ 13 (emphasis added), filed May 29, 2007 ("Petition") and *BellSouth Telecommunications, Inc., d/b/a AT&T South Carolina's Motion to Dismiss and, in the Alternative, Answer* at ¶ 17, filed June 22, 2007 ("Motion" or "Answer" as applicable).

[5] Transcript references are to the filed "Transcript of Testimony and Proceedings," Hearing #10881 held August 20, 2007, Docket No. 2007-215-C ("Witness Name" Tr. p. ___, lines ___ - ___).

[6] In support of the arguments presented herein, Sprint also relies on its *Response to AT&T South Carolina's Motion to Dismiss and Answer* filed July 2, 2007 as if incorporated fully herein ("Sprint Response").

only Section 252(b)(1) of the Act, but also the change of law and dispute resolution Sections 18.4 and 14.1 of the Parties' existing agreement.

Second, the Commission has always had subject-matter jurisdiction to resolve disputes regarding contract terms pertaining to the length of an interconnection agreement, and to implement such contract terms pursuant to Section 252(b)(4)(c), and 252(c)(1) and (3) of the Act, as well as S.C. Code Ann. Section 58-9-280(c)(1). Consistent with the existing body of merger-related case law, the FCC Order expressly recognized that the Merger Commitments (which became express Conditions of the FCC's merger approval) did not:

> "...restrict, supersede, or otherwise alter state or local jurisdiction under ... the Act ... or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments."[7]

Accordingly, just as the Commission had jurisdiction to resolve disputes regarding contract terms pertaining to the length and commencement of an interconnection agreement *before* the AT&T / BellSouth merger, nothing in the FCC's approval Order altered this Commission's jurisdiction to resolve any Merger Commitment *interconnection-related* dispute *after* the merger occurred.

Third, Sprint's request is entirely consistent with the letter and intent of the FCC Order. The FCC Order unequivocally states that the Merger Commitments "apply ... for a period of forty-two months from the Merger Closing Date." As explained by FCC Commissioner Copps, the purpose of the interconnection-specific Merger Commitments was to mitigate concerns regarding the *merged entity* using its market power to reverse the inroads that new entrants had made and in fact squeeze them out of the market. The interconnection-specific Merger Commitments are considered important to fostering residential telephone competition and

[7] FCC Order, APPENDIX F at page 147.

ensuring that the merger does not in any way retard competition.[8] Sprint's request for a prospective three-year extension of the Parties' existing agreement is fully consistent with the promotion of competition between Sprint and the post-merger South Carolina AT&T entity.

AT&T's position and its awkward, strained retroactive application of any three-year extension through the use of a December 31, 2004 commencement date fails to recognize the current status of the Parties' contract, as well as the express provisions and intent of the FCC Order. AT&T's retroactive application ignores: 1) the Parties' express contract language that results in the "current" agreement that is subject to extension is in fact the Parties' "current" month-to-month agreement; 2) the AT&T, Inc. / BellSouth Corp. Merger Closing Date of December 29, 2006; 3) the Merger Conditions' Effective Date of December 29, 2006; and 4) the fact that AT&T's position results in 2 years of a three-year extension being applied to an otherwise independent pre-merger BellSouth entity. Simply put, AT&T's position is *inconsistent* with both the Parties' contract and the express provisions and intent of the FCC Order.

For the reasons summarized above and discussed in greater detail below, Sprint respectfully requests that the Commission deny AT&T's Motion to Dismiss Sprint's Petition, and further find that:

1. the Commission has concurrent jurisdiction to resolve the Parties' interconnection dispute regarding the commencement date of a three-year extension to the Parties' current, effective month-to-month Interconnection Agreement;

2. Sprint is entitled to the amendment Sprint submitted to AT&T to convert and extend the Parties' current, effective month-to-month Interconnection Agreement to a fixed three-year term that commences March 20, 2007[9]; and,

---

[8] *See* FCC Order, "Concurring Statement of Commissioner Michael J. Copps," at page 172.

3. AT&T's proposed Issue 2 was *not* discussed within the Parties' interconnection negotiations, is inconsistent with AT&T's acknowledgement that Sprint is entitled to a three-year extension, and should be dismissed with prejudice.

II. PROCEDURAL BACKGROUND

On May 29, 2007, Sprint filed its Petition with the Commission pursuant to Sections 251 and 252 of the Act. Prior to December 29, 2006, Sprint and the legacy BellSouth South Carolina ILEC entity were engaged in negotiations for a new interconnection agreement. However, on December 29, 2006, the FCC authorized the merger of AT&T, Inc. and BellSouth Corporation subject to AT&T, Inc.'s proposed "Merger Commitments" that became "Conditions" of the FCC's merger approval.[10] One of the interconnection-specific Merger Commitments required the new AT&T post-merger entity ILECs to permit a requesting telecommunications carrier to extend its current interconnection agreement with such AT&T merger ILECs for a period up to three years.

Shortly after the December 29, 2006 AT&T/BellSouth merger, Sprint and the now post-merger AT&T discussed the three-year extension Merger Commitment within their then-ongoing and extended interconnection negotiations, but disagreed on when such an extension could commence. On March 20, 2007, Sprint tendered a proposed three-year extension amendment to AT&T for execution, which AT&T refused to execute. By its Petition Sprint seeks to implement its proposed amendment to convert and extend the Parties' current, effective month-to-month Interconnection Agreement to a fixed three-year term, with a March 20, 2007 commencement date.

---

[9] *See* Petition Exhibit C.

[10] FCC Order, Ordering Clause ¶ 227 at page 112.

In recognition of and response to Sprint's Petition filed on May 29, the Commission issued its Notice of Hearing and Prefile Testimony Letter on June 14, 2007. On June 22, The South Carolina Office of Regulatory Staff ("ORS") filed a Notice of Appearance of Counsels Nanette S. Edwards and Shannon Bowyer Hudson.

Also on June 22, AT&T filed its Motion to Dismiss and interrelated Answer to Sprint's Petition. AT&T contends that because the source of Sprint's requested three-year extension was a Merger Commitment, Sprint's Petition seeks an "interpretation of a merger commitment" that is a non-arbitrable issue unrelated to Section 251 of the Act.[11]

According to AT&T, the FCC has "the sole authority to interpret, clarify, or enforce any issue involving merger conditions set forth in its Merger Order."[12] AT&T requested that the Commission dismiss Sprint's single arbitration Issue and, instead, grant AT&T the relief it asked for through its proposed Issue 2, i.e., Commission adoption of a "new" interconnection agreement premised upon: a) the Parties' former incomplete negotiations; and b) adoption of AT&T's latest "generic" Attachment 3A and 3B documents, pertaining to "Network Interconnection" terms and conditions that were never previously discussed by the Parties.[13]

Notwithstanding any other assertion by AT&T, AT&T's Answer unequivocally conceded that AT&T had acknowledged that Sprint is entitled to a three-year extension, and that the issue with respect to such extension is its commencement date. Specifically, AT&T admitted, *without qualification*, Sprint's allegations that:

> Soon after the FCC-approved Merger Commitments were publicly announced on December 29, 2006, the Parties considered the impact of the Merger

---

[11] *See Motion* at unnumbered p. 1, 2.

[12] *Id.* at unnumbered p. 3.

[13] *Id.* at unnumbered p. 10-12.

Commitments upon their pending Interconnection Agreement negotiations. *AT&T acknowledged that, pursuant to Interconnection Merger Commitment No. 4, Sprint can extend its current Interconnection Agreement for three years. The Parties disagree, however, regarding the commencement date for such three-year extension.*[14]

On July 2, 2007, Sprint filed a Response to AT&T's Motion and Answer,[15] in which Sprint took the following positions:

1. During the course of the Parties' Section 251-252 negotiations, their current Interconnection Agreement automatically converted pursuant to its express provisions to a month-to-month term as of January 1, 2005, and has not expired; AT&T acknowledged that Sprint could extend its current Interconnection Agreement for 3 years; Sprint has taken all action within its power to exercise its right and accept a three-year extension of its current Interconnection Agreement; therefore, the only legitimate dispute to be resolved between the Parties to implement such three-year extension is this Commission's determination as to when the three-year extension commences.

2. There is a long history of FCC and state Commission precedent that establishes the FCC and the Commission have concurrent statutory jurisdiction under the Act and state law over AT&T's interconnection-specific Merger Commitments. Sprint argued that the Commission has jurisdiction pursuant to both the Act and South Carolina law to arbitrate the creation of an amendment term that establishes when the three-year extension of the Parties' existing Interconnection Agreement commences; and

3. The relief requested by AT&T through its newly proposed Issue 2 is unwarranted under the law and is unsupported by facts as alleged in the Petition and admitted by AT&T to the

---

[14] Sprint Petition at ¶13 (emphasis added); AT&T Answer at ¶ 17 unqualified admissions.

[15] "Sprint's Response to AT&T South Carolina's Motion to Dismiss and Answer," filed July 2, 2007 ("Response").

effect that Sprint is entitled to a three-year extension and the only issue is when such extension commences. Accordingly, Sprint recommended that the Commission dismiss AT&T's proposed Issue 2.

On August 17, 2007, the Commission found that "this dispute deserves a complete airing by all the parties in this matter" and ordered that AT&T's Motion to Dismiss be held in abeyance in order for the Commission "to make a fully reasoned determination in this case."[16] Thereafter, the Commission held an evidentiary hearing on August 20, 2007. Sprint sponsored the testimony of its witness, Mr. Mark G. Felton, and AT&T sponsored the testimony of Messrs. J. Scott McPhee and P. L. (Scot) Ferguson. Counsel for ORS participated in the hearing, but ORS did not sponsor a witness.

Subsequent to the hearing, on August 27, 2007, the Parties jointly filed a letter in this docket, in which they requested that the Commission establish September 14, 2007 as the deadline for the submission of Proposed Orders and post-hearing Briefs. Further, the Parties requested that the Commission agree to extend the deadline for resolution of the unresolved issues in this matter to October 5, 2007.

III. FACTS

Sprint and BellSouth Telecommunications, Inc. ("BellSouth") entered into a Commission-approved Interconnection Agreement with an initial January 1, 2001 effective date. A "true and correct copy of the Parties' *current*, 1,169 page Interconnection Agreement, as amended, can be viewed on AT&T's website at http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf ."[17]

---

[16] "Order Holding Motion to Dismiss in Abeyance," filed August 14, 2007.

[17] Petition ¶7; Answer ¶11; Felton Tr. p. 27, line 16 – p. 28, line 3.

Sprint and Bellsouth began negotiations for a new agreement under Section 251-252 of the Act in mid-2004.[18] During the course of the negotiations, pursuant to the express terms of the Parties' Interconnection Agreement: a) the fixed term of the Interconnection Agreement expired on December 31, 2004, whereupon b) there was a "conversion of [the] Agreement to a month-to-month term," and c) upon the filing of an arbitration proceeding in accord with Section 252 of the Act and no decision by the Commission prior to expiration of the fixed term, the agreement was "deemed extended on a month-to-month basis."[19] Even in the absence of the presently pending arbitration proceeding, the agreement would have continued on a month-to-month basis until it was otherwise terminated by one Party sending the other a 60-day termination notice.[20]

Notwithstanding AT&T's unsupported assertions to the contrary, the Parties' month-to-month Interconnection Agreement has been kept *up-to-date* via ten amendments, the last six of which occurred during the interconnection negotiations between August, 2004 and October, 2006 (with an effective date of *November, 2006*).[21] The most extensive negotiated amendment was the

---

[18] Petition ¶8; Answer ¶12; Felton Tr. p. 28, line 9 – 13.

[19] Felton Tr. p. 29, lines 5 – 16; p. 80, line 17 – p. 82, line 12 (operation and continuing updating of agreement during month-to-month term); Exhibit 1/Exhibit MGF-1, Amendment 3, Sections 2.1 and 3.3 and Amendment 4, Section 2.1; Felton Tr. p. 51, line 16 – p. 53, line 7.

[20] Felton Tr. p. 51, line 25 – p. 52, line 2; Tr. p. 79, lines 11 – 16; Exhibit 1/Exhibit MGF-1, Amendment 3, Sections 3.3; *see also* AT&T witness McPhee at Tr. p. 175 line 12 – line 17:

> Q And if the statutory window had closed without a timely arbitration petition being filed on May 30th, under the express terms of the interconnection agreement, it would still be in effect on May 31, 2007, and continue on a month-to-month basis, wouldn't it?
>
> A I believe that would be true.

[21] Felton Tr. p. 27, line 19 – p. 28, line 17; p. 76, line 2 – 3; Exhibit 1/Exhibit MGF-1; *see also* Petition ¶7; Answer ¶11; *see* http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf at pages 836 (August, 2004 Amendment) to 1,169 (most recent October, 2006 amendment, *effective in November, 2006*). [Note: it appears an oversight occurred regarding the Transcript filed hearing Exhibits that Exhibit 1 does not appear to include the last (i.e. 3rd) page of Mark G. Felton's Exhibit MGF-1 which includes a summary of the Parties' Interconnection Agreement Amendments 9 and 10. This page is, however, still contained in the Docket record as part of the original Prefiled Direct Testimony of Mark G. Felton Filed July 9, 2007.]

9th amendment, a March 11, 2006 amendment to implement changes resulting from the FCC's Triennial Review Remand Order.[22]

Sprint and BellSouth continued to be engaged in interconnection negotiations when the FCC approved the AT&T / BellSouth merger on December 29, 2006.[23] AT&T admits that prior to December 29, 2006, the BellSouth South Carolina entity was not an AT&T affiliate, and did not become an affiliate of the "new merged entity" until the AT&T, Inc. / BellSouth Corp. merger closed on December 29, 2006.[24] In order to obtain the FCC's approval of that merger, AT&T Inc. made promises that became "conditions" of the FCC's merger approval.[25] Among other things, the promises and resulting conditions imposed upon the "new" AT&T merger entities included four interconnection agreement-specific conditions directed at "Reducing Transaction Costs Associated with Interconnection Agreements."[26] Pertinent to this case, when the former BellSouth ILEC entity in this case became a subsidiary of the new AT&T merger entity on December 29, 2006 it became bound by Merger Commitment No. 4, which provides that AT&T:

> "shall permit a requesting telecommunications to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only

---

[22]Felton Tr. p. 30, line 20 – p. 31, line 2; Exhibit MGF-1; *see* http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf at pages 873 - 1,165; *see also* Felton Tr. p. 68, line 4 – p. 12; p. 69, line 22 – p. 70, line 2; p. 80, line 22 – p. 81, line 7.

[23]*See* Petition ¶13, first sentence, "Soon after the FCC-approved Merger Commitments were publicly announced on December 29, 2006, the parties considered the impact of the Merger Commitments upon their pending negotiations"; Answer ¶17.

[24] McPhee Tr. p. 161, lines 3 – 15.

[25] Petition ¶10; FCC Order, Ordering Clause ¶ 227 at page 112, and APPENDIX F; Answer ¶14; Admission No. 3.

[26] FCC Order at pages 149 - 150, APPENDIX F.

> via the carrier's request unless terminated pursuant to the agreement's 'default' provisions."[27]

AT&T's Answer paragraph 17 admits without qualification the allegations in paragraph 13 of the Petition that:

> Soon after the FCC approved Merger Commitments were publicly announced on December 29, 2006, the Parties considered the impact of the Merger Commitments upon their pending Interconnection Agreement negotiations. AT&T South Carolina acknowledged that, pursuant to Interconnection Merger Commitment No. 4, Sprint can extend its current Interconnection Agreement for three years. The Parties disagree, however, regarding the commencement date for such three-year extension.

The Merger Commitments were approved by the FCC at a time that Sprint and AT&T were in the thick of negotiations for a new agreement. Several substantial issues had been resolved, but there remained areas of dispute. From Sprint's perspective as the requesting carrier, as of December 29, 2006, a new agreement was far from finalized, voluntary agreement remained uncertain[28] and Sprint was duty-bound to consider AT&T's Merger Commitment interconnection offerings in the context of the ongoing negotiations. Consideration of AT&T's Merger Commitment interconnection-specific offerings was not a separate, unrelated effort. It was part and parcel of the Parties' ongoing interconnection negotiations.[29]

The Parties' negotiations expanded to include Sprint's evaluation of extending the term of its current month-to-month Interconnection Agreement as a result of Merger Commitment

---

[27] *Id.* at p. 150.

[28] Felton Tr. p. 73, line 8 - p. 74, line 3 ("...just to make sure this Commission understands where we had been in this negotiation, I and several of my colleagues made a trip to Atlanta in an effort to resolve, finally, all of the issues in the agreement, and we left Atlanta feeling like we had a deal. And we got back to Kansas City and, in a subsequent conference call, learned that, no, that deal wasn't exactly what we expected it to be. So I guess what I'm trying to say is, there were several times where we felt like we were done, we had an agreement that was ready to execute, just putting the final, finishing touches on it, and it fell apart. And I don't feel like what we had at the end of December was done."); p. 76, line 21 – p. 78, line78 (multiple issues remained unresolved).

[29] Felton Tr. p. 59, line 23 – p. 60, line 9.

No. 4. Any suggestions by AT&T's witnesses Ferguson or McPhee to suggest that Sprint disengaged from negotiations demonstrates a lack of first-hand knowledge regarding the merger condition-related negotiations that actually occurred, and which started almost immediately after the AT&T merger closed and the Merger Commitments were made public.[30] Contrary to AT&T's contention that "Sprint withdrew from its negotiations with AT&T,"[31] the following summarizes Sprint's efforts to continue to reach a negotiated post-merger resolution with AT&T:

1. On January 3, 2007, the parties had a telephone call in which they immediately began discussing the impact of AT&T's interconnection-specific Merger Commitments on their pending negotiations. Based on that call, it was agreed that Sprint would submit written Merger Commitment-related questions later the same day, of which the very first question requested:

> "Confirmation that Sprint may extend its 2001 ICA (which is currently on a month-to-month term) for up to three years?"[32]

2. On January 10, 2007, AT&T negotiator Lynn Allen-Flood advised Sprint in writing that Sprint could indeed extend the 2001 Interconnection Agreement, but that more time was required to flesh out the details, stating:

> "BellSouth is working to get answers to these questions but will not have them by our scheduled meeting tomorrow, thus would prefer to cancel that meeting and reschedule once we have more information. The answer to Sprint's main question is that Sprint *can* extend the 2001 ICA, however, I do not yet have all the details to fully respond. Considering this, BellSouth proposes to extend the arbitration close by two weeks and the associated letter is attached for your confirmation."[33]

3. Thereafter, the Parties extended the respective, then-existing 251-252 negotiation arbitration windows for the 9 legacy-BellSouth AT&T states not once, but twice, to provide

---

[30] Felton Tr. p. 44, line 18 – p. 46, line 2.

[31] AT&T Motion at unnumbered p. 11.

[32] Felton Tr. p. 64, line 4 – line 12.

additional time to consider the Merger Commitments in the context of the Parties' negotiations. The first extension was for a short period of time from early January to early February as set forth above, followed by yet a longer extension that resulted in the first arbitration window *opening* in late March (*See* Petition Exhibit A).[34]

4. As of February 1, 2007, considering AT&T's January 10, 2007 response that Sprint could extend its 2001 ICA but AT&T had still not yet responded to all of Sprint's Merger Commitment related questions, Sprint made a good-faith settlement offer. Sprint followed up on February 5th and requested a meeting to discuss Sprint's offer. On February 7th AT&T responded that such a meeting would be "premature." On February 14th, Sprint again requested a meeting no later than February 23rd to discuss any further AT&T response to Sprint's Merger Commitment-related questions and Sprint's February 1st settlement offer.[35]

5. On February 21st, after having Sprint's settlement offer 3 weeks, AT&T advised that it was "surprised" by Sprint's settlement offer and any substantive response AT&T could provide at this time would not meet with Sprint's approval. AT&T proposed an additional 60-day extension to the arbitration windows so that the first window would close June 16 and requested a call the week of March 5th - but further added AT&T would not have any substantive response to Sprint's February 1st settlement discussion document *until mid April*. On March 7th, AT&T further clarified that its offer for a call the week of March 5th was to let Sprint know

---

[33] Felton Tr. p. 46, lines 12 – 19 (emphasis in original AT&T e-mail).

[34] Felton Tr. p. 47, lines 4 – 15.

[35] Felton Tr. p. 47, line 17 – p. 48, line 2.

AT&T was glad to meet but acknowledged that there was nothing more to share at that point from AT&T.[36]

As demonstrated by the foregoing facts, it was AT&T that ultimately chose to disengage from substantive negotiations and, instead, attempt to merely continue to extend the statutory arbitration window. In light of the overall 42-month Merger Commitment limitation period, Sprint had, and continues to have, substantial concerns regarding what impact such AT&T delays and non-compliance may ultimately reek upon Sprint's efforts to timely implement its rights to a full three-year extension.[37] Sprint ultimately concluded it was not willing to leave it to AT&T to further delay negotiations and Sprint sent its March 20, 2007 letter to formally state and summarize the Parties' disputed positions regarding the three-year Interconnection Agreement extension commencement date, and tender a proposed extension amendment for AT&T's execution (Petition Exhibit C).[38]

Sprint's March 20, 2007 letter specifically requested an amendment to Section 2 of the Parties' current month-to-month Interconnection Agreement that:

a) Converts the Agreement from its current month-to-month term and extends it three years from the date of the March 20, 2007 request to March 19, 2010; and,

b) Provides that the Agreement may be terminated only via Sprint's request unless terminated pursuant to a default provision of the Agreement; and,

c) Since the Agreement has already been modified to be TRRO compliant and has an otherwise effective change of law provision, recognizes that all other provisions of the Agreement, as amended, shall remain in full force and effect.[39]

---

[36] Felton Tr. p. 48, lines 4 – 13.

[37] Felton Tr. p. 48, lines 15 - 20.

[38] Felton Tr. p. 48, line 20 – p. 49, line 3.

[39] Petition ¶14 and Petition Exhibit C; Answer ¶18.

The Parties' impasse regarding the three-year amendment commencement date was confirmed in writing by AT&T's April 4, 2007 response to Sprint's March 20, 2007 letter. The ultimate effect of AT&T's response was to deny Sprint's request for a three-year extension of the Parties' Interconnection Agreement from March 21, 2007 and reiterate that AT&T will only voluntarily extend the parties' Interconnection Agreement in a manner that results in an extension only to December 31, 2007.[40]

It is against the foregoing negotiation history that, after-the-fact, AT&T seeks to impose what AT&T "believes" was the majority of an otherwise, admittedly unfinished pre-merger negotiation between the Parties, along with AT&T's "generic" Attachment 3[41] as a "gap" filler.[42] There is, however, absolutely no testimony that AT&T's Attachment 3 was ever submitted to Sprint for consideration, or otherwise discussed during negotiations for any purpose – much less as any "gap" filler to be used in contravention of Sprint's undisputed right to a three-year extension of the Parties' existing Interconnection Agreement[43].

IV. LEGAL STANDARDS UNDER THE 1996 ACT

Sections 251 and 252 of the Act encourage negotiations between parties to establish interconnection agreements. Pursuant to the Act, where negotiations do not result in an agreement, the Act allows either party to petition the Commission for arbitration of the unresolved issues.[44] The Petition must identify the issues resulting from the negotiations that are

---

[40] Petition ¶15 and Petition Exhibit D; Answer ¶19.

[41] *See* AT&T Motion at unnumbered p. 11, describing submitted Attachments 3A and 3B as AT&T's "generic Attachment 3A, for wireless interconnection services, and 3B for wireline interconnection services."

[42] McPhee Tr. p. 179, lines 1 – 6.

[43] *See* Felton Tr. p. 56, lines 1 – 18 (explaining incongruity in AT&T even raising its "standard Attachment 3" as some sort of gap filler contrary to Sprint's exercise of its right of a three-year extension).

[44] 47 U.S.C § 252(b)(2).

resolved, as well as those that are unresolved. [45] The petitioning party must submit along with its petition "all relevant documentation concerning: (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issues discussed and resolved by the parties.[46] The non-petitioning party to a negotiation may respond to the other party's Petition and provide such additional information as it wishes within 25 days after the Commission receives the petition.[47]

The Act limits the Commission's consideration of any Petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.[48] Further, an ILEC can only be required to arbitrate and negotiate issues related to Section 251 of the Act, and the Commission can only arbitrate non-251 issues to the extent they are required for implementation of the interconnection agreement.[49] Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding, and the Commission's role is to resolve the parties' open issue to "meet the requirements of Section 251, including the regulations prescribed by the [FCC]."[50]

It is undisputed that Sprint is entitled to a three-year extension of the Parties' current, existing month-to-month agreement with AT&T, and the dispute between the Parties with respect to such extension pertains to the commencement date of the extension. Thus, application of the above standards begins with Section 251(c). Pursuant to Section 251(c)(1) AT&T had a

---

[45] *See Generally*, 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4).

[46] 47 U.S.C. § 252(b)(2).

[47] 47 U.S.C. § 252(b)(3).

[48] 47 U.S.C. § 252(b)(4).

[49] *Coserv Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5th Cir. 2003); *MCI Telecom., Corp. v. BellSouth Telecom., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

[50] 47 U.S.C. § 251(c)(1).

statutory duty to negotiate with Sprint "particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section [251] and this *subsection [(c)]*."[51] *Subsection 251(c)*(2)(D), specifically imposed upon AT&T "the duty to provide, for ... interconnection ... on rates, *terms and conditions* ... in accordance with the terms and conditions of the agreement and the requirements of this section [251] and section 252."[52] *Both the length of an interconnection agreement and its commencement date are terms and conditions that, if disputed, represent the most basic, typical type of interconnection disputes that are subject to Commission resolution.*[53]

Two Florida Public Service Commission Orders arising out of arbitrations between two CLECs (MCI and AT&T) and GTE, clearly demonstrate the rationale for the state commissions to resolve disputes regarding the term-of-years and commencement date of an interconnection agreement under the Act. The CLECs sought five-year term interconnection agreements with GTE, while GTE insisted on a term of no more than two years. The FPSC held that under Sections 252(b)(4)(C) and 252(c)(3) it was required to provide a schedule to implement the parties' agreements, even though the Act, FCC Orders and FCC rules did not contain any specific

---

[51] 47 U.S.C. § 251(c)(1), emphasis added.

[52] 47 U.S.C. § 251(c)(2(D) (emphasis added).

[53] *See e.g., In the Matter of: The Petition by AT&T Communications of the South Central States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996,* Order, Kentucky Public Service Commission Case No. 96-478, 1997 Ky. PUC LEXIS at *36 (February 14, 1997) (Commission resolved dispute regarding 5 vs. 2 year contract term); *In the Matter of: Petition of Brandenburg Telecom LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Verizon South Inc. Pursuant to the Communications Act of 1934, As Amended by the Telecommunications Act of 1996,* Order, Kentucky Public Service Commission Case No. 2001-224, 2001 Ky. PUC LEXIS 1418 at *20 (November 15, 2001) (Commission required Verizon to modify provisions regarding term of the agreement to reflect that either party may terminate, subject to other party's right to demand arbitration of the termination).

provisions governing the appropriate term of an agreement.[54] The FPSC then gave the parties another opportunity to negotiate a mutually acceptable term for the agreement. Although the CLECs and GTE ultimately agreed to a three-year term, AT&T and GTE could not agree on language regarding the *date the agreement could actually commence*. The FPSC arbitrated that dispute as well, again relying upon 252(b)(4)(c) as the basis for its jurisdiction.[55]

Similarly, the 11th Circuit has clearly explained that a state commission's broad authority under Section 252(b)(4)(C) permits it to arbitrate 251-related implementation disputes that are not expressly itemized in Section 251 of the Act.[56] In the *MCI* case, the FPSC originally found that it did *not* have jurisdiction to arbitrate disputes over enforcement provisions and liquidated damages because those matters were not specifically listed in Section 251 as subjects of arbitration. The 11th Circuit disagreed with this limited view of state Commission jurisdiction over interconnection arbitrations, holding that the FPSC has jurisdiction under 252(b)(4)(C) to arbitrate *any provision* that is "within the realm of 'conditions . . . required to implement' the agreement."[57]

There simply is no provision under the Act or existing case law to support a different application of the Act because Sprint's right to a three-year extension of the Parties' existing agreement emanated from the FCC's AT&T/BellSouth merger Order. To the contrary, as further

---

[54] *In Re: Petition by AT&T Communications of the Southern States, Inc. et. al. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996,* Docket Nos. 960847-TP and 960980-TP; Order No. PSC-97-0064-FOF-TP, 1997 Fla. PUC LEXIS 71 at *270 - *271 (January 17, 1997).

[55] *In Re: Petition by AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996,* Docket No. 960847-TP; Order No. PSC-97-0585-FOF-TP, 1997 Fla. PUC LEXIS 600 at *1 -*2 and *7 - *9 (May 22, 1997).

[56] *MCI v. BellSouth,* 298 F.3d 1269 (11th Cir. 2002).

[57] *Id,* 1274.

explained in the Discussion Of Individual Issues section of this brief below, both the FCC Order in the AT&T/BellSouth merger, and existing case law make it clear that the Commission's concurrent jurisdiction under the Act to resolve the interconnection-specific dispute between the Parties in this case is not affected by the FCC's Order.

V. DISCUSSION OF INDIVIDUAL ISSUES

ISSUE 1: May AT&T South Carolina effectively deny Sprint's request to extend its current Interconnection Agreement for three full years from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4?

A. THE FCC AND THE COMMISSION HAVE CONCURRENT JURISDICTION REGARDING INTERCONNECTION-SPECIFIC DISPUTES

Regarding AT&T's threshold challenge to the Commission's jurisdiction to arbitrate Sprint's Issue 1, Sprint has already briefed in its Response to AT&T's Motion to Dismiss and Answer, and incorporates herein by reference, the extensive authority that confirms it is perfectly appropriate and expected that this Commission take into consideration and apply "federal law" in the form of the FCC Order to resolve the Parties' dispute – this is exactly what the Commission does every time it applies the Act, FCC Orders, and FCC rules and regulations whenever it resolves an interconnection-specific dispute. The Act expressly provides a jurisdictional scheme of "cooperative federalism" under which Congress and the FCC have specifically designated areas in which they anticipate that state commissions have a role, which undeniably includes matters relating to interconnection pursuant to Sections 251 and 252 of the Act.[58]

[58]Sprint Response, Section III at p. 7 – 13.

The immediately preceding Section IV, "Legal Standards Under the 1996 Act," also explains not only the statutory basis under which AT&T was charged with a duty to negotiate the commencement date of a three-year extension to the Parties' Interconnection Agreement pursuant to 251(c)(2)(D), but the case law that clearly establishes that state commissions regularly arbitrate disputes regarding the term-of-years and commencement date of interconnection agreements. Further, not only does the Commission have jurisdiction pursuant to Section 252 of the Act but, consistent with the Act, S.C. Code Ann. Section 58-9-280(c)(1)[59] also authorizes the Commission to establish terms and conditions of interconnection that are consistent with federal law, and to arbitrate any dispute regarding interpretation of interconnection terms and conditions.[60]

In addition to the foregoing identified bases upon which the Commission has authority to act in this matter, the appropriateness of the Commission resolving a dispute arising out of any regulatory action that materially affects any material term of the Parties' agreement is also addressed in the Parties' Interconnection Agreement. Section 18.4 of the Interconnection Agreement contains a typical "change in law" provision that encompasses changes driven by regulatory or other legal actions and, absent a negotiated resolution of such changes, any disputes

---

[59] S.C. Code Ann. Section 58-9-280(c)(1) states as follows:

> (C) The commission shall determine the requirements applicable to all local telephone service providers necessary to implement this subsection. These requirements shall be consistent with applicable federal law and shall: (1) provide for the reasonable interconnection of facilities between all certificated local telephone service providers upon a bona fide request for interconnection, subject to the negotiation process set forth in subsection (D) of this section."

[60] *See, e.g.*, South Carolina Public Service Commission Docket No. 2005-57-C, *In Re Joint Petition for Arbitration on Behalf of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Order No. 2006-692 (issued November 21, 2006), at 2 (quoting e.spire Communications, Inc. v. New Mexico Public Regulation Commission, 392 F. 3d 1204, 1207 (10th Cir. 2004) ("an interconnection agreement is not to be construed as a traditional contract, but as an instrument arising within the context of ongoing federal and state regulation")..

over the proposed changes become subject to the Section 14.1 dispute resolution provision.[61] Pursuant to Section 14.1, Sprint, has the option of petitioning either the FCC or the Commission to resolve such a dispute.[62] Sprint opted to pursue arbitration of the Parties' dispute before the Commission, rather than the FCC.

Based upon all of the foregoing reasons, it is clear that there are multiple jurisdictional bases upon which the Commission would typically be the proper authority to resolve the dispute as presented by Sprint's Issue 1.

B. THE FCC'S MERGER ORDER DID NOT RESTRICT, SUPERCEDE OR OTHERWISE ALTER THE COMMISSION'S JURISDICTION OVER INTERCONNECTION-RELATED TERMS AND CONDITIONS

Sprint again incorporates by reference its already extensively briefed authority in Sprint's Response to AT&T's Motion to Dismiss and Answer, establishing that the FCC has repeatedly and expressly recognized in its merger orders that: adoption of merger conditions does not limit the authority of the states to impose or enforce requirements, which can even go beyond FCC-required conditions; the FCC not only expects the states to be involved in the ongoing administration of interconnection-specific merger conditions, but recognizes the states' concurrent jurisdiction to resolve interconnection-specific disputes pursuant to Section 252; and,

---

[61] *See* http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf, Section 18.4 at page 819:

> "In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement ... Sprint or BellSouth may, on thirty (30) days' written notice, require that such terms be renegotiated ...."

[62] *See* http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf, Section 14.1 at pages 818:

"Except as otherwise state in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, then if the aggrieved Party elects to pursue such dispute, the aggrieved Party may petition the FCC or Commission for a resolution of the dispute."

the FCC itself has expressed a belief that even its complaint enforcement authority may be considered secondary to the states with respect to such disputes.[63]

Despite such history, AT&T apparently contends that in the AT&T / BellSouth merger, the FCC ignored all prior merger precedents and, instead, "explicitly reserved jurisdiction over the merger commitments" by virtue of the following language in the FCC Order: "[f]or the avoidance of doubt, unless otherwise stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC." AT&T further asserts that "[n]owhere in Appendix F does the FCC provide that interpretation of merger commitment No. 4 is to occur outside the FCC."[64] As Sprint has previously pointed out, this is simply not an accurate statement with respect to Appendix F.

The FCC unequivocally recognized in Appendix F that it has no authority to alter the states' *concurrent* statutory jurisdiction under the Act over interconnection matters addressed in the Merger Commitments. The paragraph immediately preceding the language relied upon by AT&T states:

> It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.

FCC Order at p. 147, APPENDIX F.

The above language was not in Mr. Quinn's December 28, 2006 proposed merger commitment letter, but was *specifically added by the FCC.*[65] Such language serves the obvious

---

[63] Sprint Response at 9 – 17.

[64] Motion at unnumbered p. 4.

[65] Ferguson Tr. p. 128, line 2 – p. 129, line 6.

purpose of recognizing, similar to what the FCC has done in prior merger orders, that the Act is designed with dual authority for both the states and the FCC. The FCC Order reflects absolutely no attempt by the FCC, nor could it legitimately do so, to alter the states' primary responsibility for arbitrating, finalizing and implementing a dispute between the Parties over a now required three-year interconnection extension amendment. As recognized in the Act and articulated by the Wisconsin PSC in *Ameritech ADS*, the FCC's role in this regard is secondary unless the state fails to take action or, as stated by the FCC itself in *Core Communications,* if a carrier elects to pursue a direct enforcement action with the FCC pursuant to Section 206 and 208.[66]

Considering the former SBC's post-merger action in the *Core Communications* case (*i.e.*, contending the FCC lacked enforcement jurisdiction over a merger condition complaint)[67], the language relied on by AT&T merely serves to make it clear that the FCC's enforcement authority remains an *available* means as opposed to the *exclusive* means by which to address any AT&T interconnection-specific Merger Commitment violations. Appendix F does not contain, nor could it, any provision that even attempts to divest the states of their jurisdiction over interconnection-specific merger commitment disputes and vest *exclusive* jurisdiction over such disputes in the FCC.

Accordingly, just as the Commission had jurisdiction to resolve disputes regarding contract terms pertaining to the length of an interconnection agreement *before* the AT&T / BellSouth merger, it still has jurisdiction to resolve such disputes *after* the FCC Order.

---

[66] *See* Sprint Response (discussing *Ameritech* and *Core Communications* cases), at pages 11 – 17.

[67] *Id.*

C. AT&T'S ANTICPATED ARGUMENTS, THE FLORIDA DECISION, AND THE TENNESSEE REGULATORY AUTHORITY'S RECENT DENIAL OF AT&T'S SIMILAR MOTION TO DISMISS

AT&T's primary authority relied upon to date in this proceeding appears to be a 1959 trucking case, *Serv. Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959), which AT&T cites for the proposition that "the interpretation of an agency order, when issued pursuant to the agency's established regulatory authority, falls within the agency's jurisdiction."[68] The case does not involve either an agency "order," or the scenario of concurrent statutory subject matter jurisdiction between a federal and state agency.

Serv. Storage involves a trucking company's federal appeal of a state imposed fine for failing to obtain a state certificate for intrastate hauling operations. The trucking company contended its operations were encompassed within the authority of its *federal interstate commerce certificate* issued by the Interstate Commerce Commission ("ICC"). What the Supreme Court stated in *Serv. Storage* at 177, was "[i]t appears clear that *interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate* and *upon whom the Congress has placed the responsibility of action*" (emphasis added). Thus, *Serv. Storage* is clearly distinguishable on the basis that, unlike the Telecommunications Act of 1996 which confers dual jurisdiction and the responsibility to act upon both a federal agency and state commission *over the same subject matter*, i.e., interconnection-specific matters, not even AT&T contends that the Motor Carrier Act creates such dual jurisdiction over *the same subject matter*. Instead, the case is apparently premised on the concept that the ICC has authority to issue and interpret federal certificates regarding

[68] AT&T Motion at unnumbered p. 4.

interstate operations and a state commission has authority to issue and interpret state certificates regarding solely intrastate operations.

Sprint also anticipates two additional jurisdictional arguments that AT&T is likely to make. First, notwithstanding that the commencement date of an agreement is an appropriate term or condition to be negotiated pursuant to Section 251(c)(2)(D) *and* necessary for the Commission's implementation of the agreement under 252(b)(4)(C) and 252(c)(3), AT&T has argued that any particular item must be expressly stated in Section 251 in order for it to be an issue that may be arbitrated. Thus, since "Merger Commitments" are not expressly listed in Section 251 they must not be arbitrable. The second, similar argument is a general "pre-emption" claim. AT&T contends that Congress has apparently pre-empted the field and conferred all authority regarding telecommunications mergers upon the FCC and, therefore, since the Act does not contain any specific references to mergers within Section 251, a state is "pre-empted" from any consideration of an FCC merger order within a Section 252 arbitration.

Sprint's response to the foregoing arguments is twofold. First, AT&T has yet to address a single merger authority relied upon in Sprint's Responses to AT&T's Motions to dismiss, nor has AT&T ever offered any specific explanation as to *how or why* it would be error for this Commission to interpret and apply the FCC Order under its existing concurrent statutory jurisdiction, just as it has any other FCC Order – *as long as such interpretation and application is not inconsistent with the Act.* Second, AT&T's arguments are contrary to the fundamental admissions of AT&T witness McPhee on cross-examination that this Commission *could in fact have jurisdiction to arbitrate issues involving certain Merger Commitment subjects.* Indeed, Mr. McPhee specifically admitted the Commission's jurisdiction to arbitrate the transit pricing, even

though that is the subject of a Merger Commitment.[69] As evident from the complete cross-examination on this subject, there was simply no stated rhyme or reason to AT&T witness McPhee's testimony as to why the Commission may have jurisdiction over one type of Merger Commitment (transit or, possibly even UNEs – he could not say one way or the other), but definitely not over another Merger Commitment (i.e., the three-year extension commitment at issue in this case).[70]

To the extent AT&T may continue to rely upon the Florida Public Service Commission's ("FPSC") Order dismissing Sprint's similar Florida arbitration Petition, Sprint respectfully points out that: a) the Order was issued at the pleading stage of the proceedings, as opposed to after an evidentiary hearing as conducted by this Commission to permit a "complete airing by all the parties in this matter"; b) the Order contains no discussion of the allegations and admissions regarding the Parties' consideration of the Merger Commitments upon their 251-252 interconnection negotiations, but instead refers to an inconsistent AT&T factual assertion "that the 'merger commitment' issue 'was not discussed in the context of the parties' negotiations of a new interconnection agreement'"[71]; c) the Order was based on Sprint's Petition "as pled" and Sprint believes that any misinterpretation of what occurred during the Parties' negotiations is being appropriately addressed by Sprint's pending Motion for Leave to file Amended Petition which provides the negotiation details to make clear what transpired within the Parties' 251-252

---

[69] McPhee Tr. p. 164, line 13 – p. 165, line 8.

[70] McPhee Tr. p. 164, line13 – p. 167, line 24.

[71] *See In the Matter of Petition of Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast,* "Order Granting Motion to Dismiss," August 21, 2007 at p. 4, Docket No. 070249-TP, Order No. PSC-07-0680-FOF-TP.

negotiations regarding AT&T's Merger Commitments; and d) *consistent with an exercise of jurisdiction by this Commission*, even the FPSC recognized that:

> "... we do not suggest that interpreting and enforcing Merger Commitments are off limits to us in all circumstances. There may be situations in which such interpretation and enforcement are inextricably intertwined with open issues begin arbitrated under either Section 252 or Section 364.162, Florida Statutes or both. In those situations it would be within our subject matter jurisdiction to arbitrate the conflicting view."[72]

Sprint further respectfully submits that, as demonstrated by the evidentiary record before this Commission, if the interpretation and application of the FCC Order regarding Merger Commitment No. 4 is not "inextricably intertwined" with a resolution of Sprint Issue 1 regarding the commencement date of a three-year extension to the Parties' current Interconnection Agreement, Sprint cannot conceive of any scenario that satisfies the standard articulated above by the FPSC.

Although neither a published Order nor transcript is yet available, also consistent with Sprint's position regarding the jurisdiction of state commissions in these cases, is the very recent action taken by the Tennessee Regulatory Authority ("TRA") during its September 10, 2007 Agenda Conference. During its meeting, the TRA unanimously denied AT&T's similar Motion to dismiss Sprint's Tennessee arbitration Petition and affirmatively held that: 1) the TRA has concurrent jurisdiction to hear Sprint's arbitration Petition, and 2) that Sprint's arbitration Petition under Section 251-252 was an appropriate means for Sprint to present the Parties' dispute regarding the three-year extension pursuant to Merger Commitment No. 4 to the TRA.

---

[72] *Id.* at p. 5.

D. THE EXPRESS LANGUAGE OF THE FCC ORDER AND SOUND POLICY ALL SUPPORT A THREE-YEAR EXTENSION OF THE PARTIES' EXISTING AGREEMENT FROM THE DATE OF SPRINT'S MARCH 20, 2007 REQUEST

There are three compelling reasons why the Commission should recognize and assert its jurisdiction in this matter, and find in favor of Sprint's proposed March 20, 2007 commencement date:

First, Sprint's proposed three-year extension commencement date is consistent with the express terms of the FCC's merger Order as applied to the express language of the Parties' existing Interconnection Agreement:

- Merger Commitment No. 4[73] states "AT&T shall permit a requesting telecommunications carrier," which thereby presupposes that a "request" must in fact be made in order to trigger the obligation under the commitment;

- The obligation is to permit the requesting carrier "to extend its current interconnection agreement, regardless of whether its initial term has expired" and, according to the express language of the existing Sprint Interconnection Agreement, the "current" effective agreement is a month-to-month agreement as to which any previously expired term is in fact irrelevant at this point;

- The Merger Commitments apply "for a period of forty-two months *from the Merger Closing Date*"[74], i.e., December 29, 2006; and,

- BellSouth was an independent entity that did not become an AT&T affiliate of the merged entity until the Merger Closing Date, i.e., December 29, 2006.

Not only is Sprint's interpretation consistent with the express language of the FCC Order and the Parties' contract language, it recognizes that the Merger Commitments were intended to encourage competition by reducing interconnection costs between a requesting carrier such as

---

[73]APPENDIX F at page 150, Merger Commitment "Reducing Transaction Costs Associated with Interconnection Agreements" ¶4.

[74]APPENDIX F at page 147, first un-numbered paragraph under "Merger Commitment ."

Sprint *and the new 22-state mega-billion dollar, post-merger AT&T.*[75] Indeed, there was acknowledged FCC concern regarding a merger that created a "consolidated entity – one owning nearly all of the telephone network in roughly half the country – *using its market power to reverse the inroads that new entrants have made and, in fact, to squeeze them out of the market altogether.*"[76]

> To mitigate this concern, ***the merged entity*** has agreed to allow the portability of interconnection agreements and to ensure that the process of reaching such agreements is streamlined. These are important steps for fostering residential telephone competition and ensuring that this merger does not in any way retard such competition.[77]

Notwithstanding the foregoing background, AT&T's proposed retroactive application of the three-year interconnection agreement extension prior to even the December 29, 2006 merger approval and closing, results in two years being applied between Sprint and *an independent pre-merger BellSouth entity* during such two-year retroactive period – which begs the question: just how does that encourage competition by reducing interconnection-agreement related costs between Sprint and the "*new*" post-merger billion dollar AT&T? The obvious answer is: *it doesn't*, and that is why AT&T's position is, on its face, contrary to the very competition that Merger Commitment No. 4 was intended to encourage and should be rejected.

---

[75] *See* FCC Order at page 169, "Concurring Statement of Commissioner Michael J. Copps":

> "... we Commissioners were initially asked to approve the merger the very next day ***without single condition*** to safeguard consumers, businesses, or the freedom of the Internet. This is all the more astonishing when you consider that this $80-some odd billion dollar acquisition would result in a new company with an estimated $100 billion dollars in annual revenue, employing over 300,000 people, owning 100% of Cingular (the nation's largest wireless carrier), covering 22 states, providing service to over 11 million DSL customers, controlling the only choice most companies have for business access services, serving over 67 million access lines, and controlling nearly 23% of this country's broadband facilities."

[76] *Id.* at page 172, emphasis added.

[77] *Id.*, emphasis added.

Second, this Commission is in the best position to *timely implement* the Merger Commitments in a manner that is "not inconsistent with [the] commitments" and continues to encourage competition within the State of South Carolina to the greatest extent possible. Unlike this Commission, if this matter were to be referred to the FCC, the FCC would not be subject to the same Section 252(b)(4)(C) statutorily imposed 9-month time-frame to resolve and implement the interconnection agreement dispute in this case. The lack of an affirmative decision by this Commission will only further exacerbate the untenable position in which Sprint and other carriers are placed in by AT&T's refusal to voluntarily honor its promises associated with "Reducing Transaction Costs Associated with Interconnection Agreements." In the face of a non-time bound referral to the FCC, AT&T will undoubtedly contend that Sprint's related affiliates Nextel South Corporation and NPCR, Inc. d/b/a Nextel Partners ("Nextel") cannot, pursuant to yet another AT&T Merger Commitment promise, "adopt" the Sprint Interconnection Agreement as long as its "term" is in litigation – notwithstanding the simple fact that in the meantime the 42-month lifespan of the merger conditions continues to run.[78]

Third, if the Commission were to find that it does *not* have jurisdiction in this case – which clearly represents the purest of all interconnection-type disputes – it is effectively inviting AT&T to challenge the Commission's jurisdiction and delay resolution of future disputes by attempting to push any dispute to the FCC whenever the magic words "Merger Commitment" touch the dispute. For example, the Commission's refusal to accept and exercise jurisdiction in this case could logically be raised by AT&T to thwart this Commission's exercise of jurisdiction

[78] If the Commission were to even remotely consider such action, Sprint suggests that the equitable way to ameliorate any harm to Sprint and Nextel would be to condition any referral of this matter to the FCC upon AT&T's consent, and dismissal with prejudice of any opposition, to the adoption of the Sprint Interconnection Agreement by Nextel in Docket Nos. 2007-255-C and 2007-256-C. This is what AT&T promised in the first place and, it should have no objection to honoring that promise for however long the Sprint Interconnection Agreement remains in place.

in any future carrier, Staff or consumer dispute involving: AT&T's failure to promote the accessibility of broadband services to consumers[79]; an AT&T failure to offer specified UNEs[80]; an AT&T failure to maintain the status quo regarding its transit service pricing[81] (notwithstanding AT&T witness McPhee's admission that the Commission has jurisdiction over the transit Merger Commitment[82]); or an AT&T failure to abide by *any* AT&T interconnection agreement approved by this Commission or within another state that another carrier seeks to adopt within or "port" into South Carolina[83], just to name a few. It is proper for the Commission to assert jurisdiction and resolve the interconnection-specific dispute in this case, just as it would be proper for the Commission to assert jurisdiction in future disputes involving the examples mentioned above.

For all of the foregoing reasons, the Commission should not only find it has jurisdiction, but also that Sprint is entitled to a conversion of the Parties' existing month-to-month Interconnection Agreement to a fixed term extended for three-years from the date of Sprint's March 20, 2007 request for such conversion and extension.

E. THE COMMISSION SHOULD GRANT SPRINT'S REQUEST TO DISMISS AT&T'S PROPOSED "ISSUE 2"

ISSUE 2 [Attachments 3A and 3B]: Should Attachments 3A and 3B be incorporated into the new interconnection agreement as "Attachment 3?"

As previously referred to throughout this Brief, AT&T admitted without qualification that Sprint had a right to a three-year extension and the Parties' dispute over the extension simply

---

[79] *See* APPENDIX F at page 148, Merger Commitment "Promoting Accessibility of Broadband Service" ¶3.

[80] *See* APPENDIX F at page 149, Merger Commitment "UNEs" ¶1.

[81] *See* APPENDIX F at page 153, Merger Commitment "Transit Service."

[82] McPhee Tr. p. 164, line 13 – p. 165, line 8.

[83] *See* APPENDIX F at page 149, Merger Commitment "Reducing Transaction Costs Associated with

pertains to its commencement date.[84] Through Issue 2, however, AT&T seeks to resurrect and impose what AT&T "believes" was the majority of an otherwise, admittedly unfinished pre-merger negotiation between the Parties, along with AT&T's "generic" Attachment 3[85] as a "gap" filler.[86] There is, however, absolutely no testimony that AT&T's Attachment 3 was ever submitted to Sprint for consideration, or otherwise discussed during negotiations for any purpose – much less as any "gap" filler to be used in contravention of Sprint's undisputed right to a three-year extension of the Parties' existing Interconnection Agreement[87].

In short, AT&T's effort to resurrect incomplete negotiations *and then supplement the same with never previously submitted or discussed material* is simply contrary to the established arbitration practice under Section 252 that the purpose of a petition and response is to frame "open issues" resulting from the negotiation. Naturally, if a matter is not discussed during negotiations, it is not an "open issue" resulting from the negotiation. Further, Sprint's exercise of its right to a three-year extension of the existing Interconnection Agreement, in and of itself, should render moot any improper effort by AT&T to resurrect the otherwise incomplete negotiations that preceded Sprint's exercise of its right to request an extension. Such a result is consistent with a recent merger commitment Order issued by the Alabama Public Service Commission in an arbitration between NewSouth and AT&T[88].

Interconnection Agreements" ¶ 1.

[84] *See* Petition ¶13; Answer ¶17.

[85] *See* AT&T Motion at unnumbered p. 11, describing submitted Attachments 3A and 3B as AT&T's "generic Attachment 3A, for wireless interconnection services, and 3B for wireline interconnection services."

[86] McPhee Tr. p. 179, lines 1 – 6.

[87] *See* Felton Tr. p. 56, lines 1 – 18 (explaining incongruity in AT&T even raising its "standard Attachment 3" as some sort of gap filler contrary to Sprint's exercise of its right of a three-year extension).

[88] *In the Matter of Joint Petition of NewSouth Communications Corp., et al., for Arbitration with BellSouth Telecommunications, Inc.*, "Ruling" in Docket 29242 issued August 6, 2007, a copy of which is in the record as

In *NewSouth*, the CLEC NuVox (f/k/a NewSouth) moved to unilaterally withdraw from a pending arbitration with BellSouth (n/k/a AT&T) on the grounds that NuVox preferred to exercise its right to "port" another carrier's interconnection agreement pursuant to an AT&T/BellSouth Merger Commitment rather than arbitrate its own new agreement. Over AT&T's objection that the issues had not been resolved in the arbitration, NuVox argued that there was nothing in the FCC Merger Order to bar its withdrawal from the arbitration and exercise its adoption right. The Alabama Commission allowed the withdrawal over AT&T's objection. The ultimate *Newsouth* result is equally applicable in this case: just as NuVox was entitled to elect to port another carrier's agreement pursuant to a Merger Commitment as the means to establish its ongoing interconnection arrangement with AT&T, Sprint is entitled to elect to extend its existing month-to-month interconnection agreement pursuant to a Merger Commitment as the means to establish Sprint's ongoing interconnection arrangement with AT&T. Clearly, the focus is upon what the requesting carrier seeks to accomplish, rather than what the new AT&T seeks to impose upon requesting carriers.

Based on the foregoing, AT&T's Issue 2 should be summarily dismissed.

VI. CONCLUSION

Sprint has properly invoked the Commission's jurisdiction with respect to an interconnection-specific dispute regarding the term of the Parties' Interconnection Agreement. The FCC Order is nothing more than another form of "federal" law which the Commission is required to take into consideration and apply in rendering a decision that is not inconsistent with the Act. Sprint's position is consistent with the express language of the FCC Order and the Parties' current Interconnection Agreement, and promotes the very competition that

---

Exhibit 7 (*"NewSouth"*).

Commissioner Copps explained the Merger Commitments were intended to promote, i.e., competition with the post-merger AT&T. In contrast, AT&T's position is inconsistent with the express language of the FCC Order, the Parties' current Interconnection Agreement, merger case law and long-standing, recognized arbitration procedure under the Act. If AT&T's positions are adopted, they will not only provide a means to thwart competition between requesting carriers and the post-merger AT&T, but the exercise of this Commission's jurisdiction in any future matter that involves any AT&T Merger Commitment.

For all of the reasons stated herein, Sprint respectfully requests that the Commission deny AT&T's Motion to Dismiss in its entirety and:

1) Find that the Commission has concurrent jurisdiction to resolve the Parties' interconnection dispute regarding the commencement date of a three-year extension to the Parties' current, effective month-to-month Interconnection Agreement;

2) Find that Sprint is entitled to, and require AT&T to execute, the amendment included in Exhibit C to Sprint's Petition, which specifies that the three-year extension of the Parties' existing Interconnection Agreement shall commence from Sprint's formal request date on March 20, 2007. In the alternative, Sprint requests that the Commission require AT&T to execute an amendment that extends the Parties' existing Interconnection Agreement for three years from the Merger Commitment and Merger Closing Date of December 29, 2006;

3) Dismiss AT&T's proposed Issue 2 with prejudice; and,

4) Finally, grant Sprint such other and further relief as the Commission deems necessary and proper.

Respectfully submitted this 14th day of September, 2007.

/s/ J. Jeffrey Pascoe
J. Jeffrey Pascoe
Womble Carlyle Sandridge & Rice
550 South Main Street
Suite 400
Greenville, SC 29601
(864) 255-5400 (Telephone)
(864) 255-5440 (Facsimile)

William R. Atkinson
Sprint Nextel
233 Peachtree Street NE, Suite 2200
Atlanta, GA 30339-3166
(404) 649-0003
Fax: (404) 649-0009
bill.atkinson@sprint.com

-and-

Joseph M. Chiarelli
6450 Sprint Parkway
Mailstop: KSOPHN0214-2A671
Overland Park, KS 66251
(913) 315-9223
Fax: (913) 523-9623
joe.m.chiarelli@sprint.com

Attorneys for Sprint